IN THE SUPREME COURT OF TENNESSEE

IN RE:	)	
	)	
PETITION FOR THE ADOPTION OF	)	
RULES GOVERNING THE	)	No. _____
MULTIJURISDICTIONAL PRACTICE	)	
OF LAW.	)	

PETITION OF THE TENNESSEE BAR ASSOCIATION FOR THE ADOPTION OF RULES GOVERNING THE MULTIJURISDICTIONAL PRACTICE OF LAW

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The Tennessee Bar Association ("TBA") petitions the Court to adopt amended rules, set out in detail below in this petition, that would govern the conduct of lawyers licensed in other jurisdictions but practicing law in Tennessee, and that would authorize such practice, on a limited, specific, and controlled basis, while governing the conduct of any lawyers who do so, all with a view toward protecting clients, the public, and the courts and honoring the choice of counsel by clients, who increasingly face multistate and interstate legal issues. In support of the adoption of these amended rules, the TBA states as follows:

THE MULTIJURISDICTIONAL PRACTICE OF LAW

A decade ago, the California Supreme Court's decision in *Birbrower, Montalbano, Condon P.C. v. Superior Court,* 949 P. 2d 1 (1998), sent shock waves throughout our nation's legal profession and courts, clearly revealing an increasing mismatch between an existing, century-old approach to regulating lawyers who historically practiced in one state, if not one county, and the growing interstate nature of law practice for lawyers in many diverse areas of practice and in virtually all practice settings. The problem quickly found a name: The "multijurisdictional practice of law" or, more simply, "MJP." MJP was the phrase that began to be used to describe the practice of lawyers across jurisdictional lines or, more precisely, the practice of law by lawyers in jurisdictions where they are not licensed or otherwise authorized to practice law.

In the wake of *Birbrower*, calls for MJP reform grew. Ultimately, the American Bar Association ("ABA"), through the 2002 adoption of reforms proposed by its Commission on Multijurisdictional Practice, established a consensus framework for reform.

The core of that framework is found in current ABA Model Rule of Professional Conduct 5.5, which authorizes the practice of law, within the confines of a "host jurisdiction" adopting the

rule, by a lawyer licensed only in another "home jurisdiction." The rule contains express limits on such practice, and clearly establishes the "host" jurisdiction's authority to discipline that lawyer. The ABA approach includes a number of other elements (some of the pertinent ones are described below) that support and build on this framework.

Particularly for a topic as complex and potentially contentious as the regulation of lawyers licensed elsewhere, the success of the ABA's basic framework has been remarkable.[1] As of date this petition is submitted, 11 jurisdictions have adopted rules identical to ABA Model Rule 5.5,[2] while another 24 have adopted similar rules, some of which are substantively identical to the ABA Model Rule.[3] Thus, a total of 35 jurisdictions have completed MJP reform, and the overwhelming majority of these jurisdictions have followed the ABA approach.[4] Another 6 jurisdictions reportedly have reform proposals pending before their high courts based upon a recommendation for the adoption of a rule identical or similar to ABA Model Rule 5.5.[5] Finally, another 5 jurisdictions reportedly have MJP study committees that have recommended adoption

[1] The information in this paragraph is drawn directly from the most definitive source for information on adoption patterns of the ABA's proposed MJP reforms, the ABA Center for Professional Responsibility's website, at http://www.abanet.org/cpr/mjp/home.html. Information posted there includes a number of detailed charts, updated regularly, about the details of the status of petitions in all the jurisdictions, as well as detailed analysis of the specific adoptions. *See also* Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY UNIV. L. REV. 637, 804-13 (2005; published Jan. 2007), a*vailable at* http://www.adamsandreese.com/pdf/ABAEthics2000StateAdoptionsArticle.pdf (including analysis of adoptions of MJP reforms for 24 jurisdictions completed through July 2006).

[2] According to the ABA's analysis, these states are Arkansas, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Oregon, Rhode Island, Utah, and Washington.

[3] According to the ABA's analysis, these jurisdictions are Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Louisiana, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wyoming.

[4] Indeed, a number of those states that have completed MJP reform, but substantively diverged from the ABA approach in some respects, have followed the lead of the ABA in addressing the problem primarily through adoption of revised (though divergent) versions of ABA Model Rule 5.5.

[5] According to the ABA's analysis, these states are Illinois, Kentucky, Maine, Michigan, Montana, and New York.

of a rule identical or similar to ABA Model Rule 5.5.[6] Of the 8 jurisdictions that border Tennessee, 5 states have now followed the ABA approach; 1 state's high court has a recommendation pending before it to adopt the ABA approach; and the remaining 2 states each have study committees that have issued recommendations that their high courts adopt the ABA approach.

The TBA believes that the time has come for Tennessee to join this broad movement of jurisdictions permitting, but expressly and intelligently regulating, the multijurisdictional practice of law. The problems associated with MJP in Tennessee are at least equal to those in other jurisdictions, and they may well be greater, given the large number of states bordering Tennessee and the daily need for lawyers to cross those borders to legitimately serve their clients. Moreover, the uncertainty associated with the recognized phenomenon of MJP, coupled with the fact that Tennessee has no authority addressing the problem, is a growing burden on clients with legal needs in Tennessee and upon the lawyers chosen by those clients.

For this reason, the TBA proposes the adoption by this Court of several reforms directly tied to MJP and associated with these issues:

- ***Adoption of ABA Model Rule 5.5***. This is the core reform adopted by the ABA, and it has met with very strong support in the states. The TBA proposes the adoption of the Model Rule, in its entirety and unchanged. (A copy of the current Tennessee Rule, redlined with proposed changes to move to the Model Rule, is attached as Exhibit A. A clean, non-redlined version of the Rule that would be in place if this Court were to adopt the TBA proposal is attached as Exhibit B.)[7]

- ***Corporate Counsel Registration***. While ABA Model Rule 5.5(c) governs various forms of temporary practice by lawyers licensed in other jurisdictions, ABA Model Rule 5.5(d)(1) permits essentially permanent practice in Tennessee in very limited circumstances, one of which is service as in-house corporate counsel. It would

[6] According to the ABA's analysis, these states are Alaska, Mississippi, Vermont, Virginia, and Wisconsin.

[7] Concerning the relationship between this Petition and the TBA's contemporaneous petition concerning various reforms that would promote the rendering of *pro bono* legal services, see *infra* at 17-18.

permit a lawyer licensed in another state, and in good standing, to move to Tennessee and serve in an in-house position, without requiring admission to the Tennessee bar.[8] The TBA also proposes that, as a supplement to this provision, a separate rule (most likely a new Supreme Court Rule) be adopted that requires that all lawyers practicing under this provision: (1) register annually with the Board of Professional Responsibility; (2) pay annual fees that are the same as those paid by ordinary Tennessee lawyers, to support the disciplinary system, the client protection fund, the lawyer assistance program, and the like; and (3) be subject to the CLE requirements of other Tennessee lawyers. A number of other states have adopted a substantially similar policy.[9] On meeting these conditions, no further requirements would be imposed on these lawyers (*e.g.*, taking the bar exam).[10]

- ***Amnesty.*** Presently, there are an unknown number of lawyers not licensed in Tennessee, but practicing as in-house corporate counsel in Tennessee. As an incentive to these lawyers to comply with the new system, the TBA proposes that a new rule should include a transition provision that provides that, upon any lawyer complying with the new rule within some reasonable period after its adoption, their prior failure to be licensed in Tennessee would be "forgiven." The TBA believes that such a provision is very important to the proper functioning of this system, so as to "surface" all covered lawyers and promptly bring them into the system.

- ***Adoption of ABA Model Rule 8.5.*** The TBA further proposes the adoption of ABA Model Rule of Professional Conduct 8.5. This proposed revision would clearly bring all lawyers not licensed in Tennessee, but practicing under the provisions of new Rule 5.5, under the disciplinary jurisdiction of the Board of Professional

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[8] There are a number of restrictions on this provision, including the prohibition on such lawyers representing anyone other than their organizational employer, and a prohibition on appearing in litigation.

[9] While the same information can be gleaned from information posted on the ABA's website, an equally authoritative site on MJP issues affecting in-house counsel is maintained by the Association of Corporate Counsel (former the American Corporate Counsel Association) at http://www.acc.com/php/cms/index.php?id=229. Based on the ACC's analysis, updated through late fall 2007, 28 jurisdictions "have adopted in-house counsel authorization or registration rules either as stand alones or in conjunction with the adoption of a version of the ABA's Model Rule 5.5." ACC List of States Authorizing Non-Locally Licensed In-House Counsel, *available at* http://www.acc.com/public/reference/mjp/inhouserules.pdf. (The ABA's analysis counts 28 such jurisdictions.) ACC also notes that 12 other jurisdictions have adopted ABA Model Rule 5.5(d)(1) concerning in-house counsel without any such registration requirement, and that 10 jurisdictions – including Tennessee – have "[n]o rule authorizing or permitting in-house practice," meaning that "[t]hese states do not make exceptions or allowances for non-locally licensed in-house counsel." *Id.* One jurisdiction (Texas) authorizes in-house practice by virtue of an ethics opinion, according to ACC. Further, on February 4, 2008, subsequent to the ACC and ABA analyses' last updates, the Supreme Judicial Court of Massachusetts adopted a rule, effective June 1, 2008, requiring annual registration with the Board of Bar Overseers by lawyers who are resident and employed as in-house counsel in Massachusetts but admitted to practice law in the state. Order Amending Chapter Four of the Rules of Supreme Judicial Court (Mass. Feb. 4, 2008), *available at* http://www.mass.gov/obcbbo/rule402amend.pdf.

[10] The ABA has under consideration a model registration rule of this type, but it is still under development. A copy of this draft rule is attached as Exhibit G, and suggestions concerning how this draft might be used as the basis for a Tennessee rule are offered below.

Responsibility. Significantly, the ABA's revision to ABA Model Rule 8.5 also updates the choice-of-law provision of the rules. (A copy of the current Tennessee Rule, redlined with proposed changes needed to move to the Model Rule, is attached as Exhibit C. A clean, non-redlined version of the Rule that would be in place it this Court were to adopt the TBA proposal is attached as Exhibit D.)

- ***Conforming Amendments to Other Supreme Court Rules***. The adoption of these proposed amendments to Rules 5.5 and 8.5 would require a number of relatively minor, mostly procedural amendments to Tennessee Supreme Court Rule 9, the Rules of Disciplinary Enforcement, Supreme Court Rule 21, the Rules for Mandatory Continuing Legal Education, and Supreme Court Rule 25, the rules governing the Tennessee Lawyers' Fund for Client Protection. The proposed amendments attempt to fit the concepts of authorized practice under Rule 5.5(c) and (d) into existing disciplinary procedures. With respect to CLE and client protection fund regulation, the proposed amendment would subject registered corporate counsel to these rules, but excuse nonresident lawyers operating under Rule 5.5 (including registered, but nonresident, corporate counsel authorized under 5.5(d)(1)) from compliance. The TBA submits, as Exhibit E to this Petition, a draft of such amendments for the Court's consideration.

- ***"Katrina" Rule***. In the wake of difficulties with displaced lawyers and the rendering of needed pro bono services in the wake of hurricanes Katrina and Rita, an ABA committee led by Memphis lawyer and TBA ethics committee member Albert C. Harvey, the ABA Task Force on Hurricane Katrina, developed a rule recently approved by the ABA House of Delegates that regularizes (1) how a jurisdiction would permit, in the event of a major disaster, lawyers licensed elsewhere to render pro bono services in the state without fear of UPL prosecution, and (2) how a jurisdiction would permit a lawyer displaced from the area of a major disaster to temporarily practice in Tennessee to maintain his practice in the affected jurisdiction. The TBA proposes that this Court adopt this rule as a part of the proposed MJP reform package, given the clear need for such a rule, the well-drafted nature of the new ABA model, and the fact that it is closely related to MJP reform. (A copy of the proposed rule is attached as Exhibit F.)

As the Court may be aware, the TBA, through its Standing Committee on Ethics and Professional Responsibility, is at work on proposed revisions of Tennessee's lawyer ethics rules that would bring Tennessee's rules largely into accord with the current ABA Model Rules of Professional Conduct. This project has been underway for several years, and is now approaching completion. Due to the importance of MJP reform to the daily lives and practices of clients and lawyers, and due to the fact that these proposals on MJP could easily be adopted separately from

any other revisions to the lawyer ethics rules that the TBA might choose to offer to the Court, the TBA believes that the proposals set out in this petition should be considered separately and sooner than other rule revisions.

THE PROBLEM OF MJP

The problems associated with MJP have been amply described and reported elsewhere, but a few points that may be most significant to the Court, as the primary regulator of the Tennessee legal profession, bear emphasis.

First and foremost, to the extent that there is a client- or public-protection issue related to the practice in Tennessee of lawyers not licensed in Tennessee, but licensed elsewhere, this Court should clarify its jurisdiction, and the jurisdiction of its Board of Professional Responsibility, to regulate and discipline any lawyers who engage in misconduct in Tennessee, including those engaged in MJP.[11]

Once the authority of the Court to regulate the conduct of such conduct is clearly established, the primary concern of the Court as regulator might well be the current lack of guidance in the law – the simple inability of clients and lawyers who want to do the right thing to be able to find, understand, and comply with the law. Clients who choose counsel not licensed in Tennessee to handle a legal problem in Tennessee that does not involve appearance in a Tennessee court – for example, to advise on an employment-related issue that involves a Tennessee employer or employee, to appear at a business negotiation in Tennessee, or to appear for the client in an arbitration to take place in Tennessee (as was the case in the facts underlying

[11] At present, the starting point for any analysis of whether the Board of Professional Responsibility would have jurisdiction to discipline a lawyer licensed in another jurisdiction, but not licensed in Tennessee, who engaged in misconduct while in Tennessee, would be Tennessee Rule of Professional Conduct 8.5(a). Even to the casual reader, Tennessee Rule 8.5(a) does not appear to grant the Board authority over any such lawyer. That rule, as currently in force, expressly extends the Board's authority only to "lawyer[s] admitted to practice in Tennessee." By contrast, the current version of ABA Model Rule 8.5(a) – which the TBA proposes that this Court adopt – removes any such doubt.

the *Birbrower* case) – are currently unable to conclusively determine whether their counsel of choice can appropriately and lawfully, in compliance with Tennessee law, provide these services. This uncertainty should be reduced or eliminated.[12]

Finally, the underlying drivers that have led to the MJP problem clearly exist in Tennessee, perhaps in greater abundance than in many other states. Since the time, almost a hundred years ago, when statutes regulating the unauthorized practice of law came into force across the country, and especially in the last generation, the legal needs of clients large and small, individual and corporate,[13] have become increasingly national in scope. Tennessee's geography and size suggest that its need to adopt a mainstream MJP solution may be greater than many other jurisdictions. Not only does Tennessee simply border so many other states, but the economies of so many of Tennessee's regions are fundamentally multi-state; where clients operate in a community that straddles jurisdictional lines, their legal problems frequently do so as well.

Moreover, despite its leadership in many areas, Tennessee is not one of the largest jurisdictions, whether judged by the size of its economy or the number of licensed lawyers regulated by this Court. Given the widespread adoption of a single model to address this

[12] This same uncertainty in the law also creates a tactical weapon that lawyers and their clients are increasingly using or tempted to use. The TBA is aware of anecdotal evidence that lawyers and others have threatened lawyers not licensed in Tennessee who propose to engage in temporary practice in Tennessee (*e.g.*, to appear for a client in an arbitration to be held in Tennessee, or to negotiate a business transaction in or relating to Tennessee) with various consequences for violation of Tennessee law. The absence of authority on these questions permits, and may encourage, such threats.

[13] Lest the Court, or any commentators on this proposal, be drawn into the error of concluding that MJP reform is purely a matter of concern to large, multi-state, or national law firms and clients, the TBA would point out that, in the 21st century, individuals called upon to relocate from one region of the country to another, or doing business in consumer or small-business transactions with others in another region of the country or the world, very frequently have disputes that require the interstate practice of law, ranging from interstate child custody disputes, to interstate enforcement of child support, to contract disputes, to employment issues. And the lawyers called upon to handle such matters include lawyers in all practice settings, from solo practitioners to small-firm lawyers to big-firm lawyers to corporate counsel.

inherently national and multi-state problem, the advantages and wisdom of strongly considering adoption of a rule based closely on that model seem clear.

THE TBA PROPOSAL

Because the features and benefits of the ABA MJP reform proposals have been very widely discussed in writing elsewhere,[14] this petition will only address several of the most important features of the proposed ABA solutions now proposed for adoption in Tennessee, and will generally describe the specific TBA proposals. To the extent not described above, some background on adoption of similar proposals in other jurisdictions will also be provided.

Proposed Rule 5.5

Proposed Rule 5.5 provides a framework for permitted and prohibited MJP. (*See* Exhibits A and B (redlined and clean versions of the Proposed Rule).)

The Proposed Rule begins with a general provision (section (a)) that prohibits a lawyer from practicing law in any jurisdiction in violation of that jurisdiction's law or regulation governing the practice or law, or from assisting another person from engaging in the unauthorized practice of law.

The remainder of the Proposed Rule is applicable only to lawyers other than those licensed in Tennessee. Section (b) prohibits lawyers not licensed in Tennessee from either establishing a "systematic and continuous presence in" Tennessee (section (b)(1)) or holding out that he or she is a lawyer (section (b)(2)), unless Rule 5.5 or other law permits doing so.

Sections (c) and (d) then address under what circumstances "lawyer[s] admitted in another United States jurisdiction, and not disbarred or suspended from practice in any

[14] Perhaps the best such article, written by a noted academic authority on ethics who was also a member of the ABA MJP Commission, is Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685 (2002), available at http://www.law.arizona.edu/Journals/ALR/ALR2002/vol4434/Gillers.pdf.

jurisdiction," may "provide legal services." These provisions divide the universe of permitted conduct into two categories – situations in which a lawyer may provide such services "on a temporary basis in this jurisdiction" (section (c)) and situations in which the lawyer's provision of such legal services is not limited to temporary activity, and thus can be permanent (section (d)).

The category of permitted temporary services includes:

- The provision of legal services where the non-admitted lawyer associates with local counsel (subsection (c)(1)).

- Where the legal services provided "are in or reasonably related to a pending or potential proceeding" anywhere, if the lawyer is authorized to pursue that proceeding or reasonably expects to be so authorized (*e.g.*, by *pro hac vice* admission) (subsection (c)(2)).

- The provision of legal services in an ADR proceeding, if the services "arise out of or are reasonably related to the lawyer's practice" in a jurisdiction where the lawyer is admitted (subsection (c)(3)).

- The provision of other temporary legal services not fitting within one of the above categories, but that "arise out of or are reasonably related to the lawyer's practice" in a jurisdiction where the lawyer is admitted (subsection (c)(4)).[15]

Section (d) identifies two further categories of legal services that may be provided on a permanent basis by lawyers from other jurisdictions:

- The provision of legal services "to the lawyer's employer or its organizational affiliates" other than services requiring *pro hac vice* admission (subsection (d)(1)).

- Legal services authorized to be provided by federal or other law (*e.g.*, patent law) (subsection (d)(2)).

Corporate Counsel Registration

One aspect of ABA Model Rule 5.5 that has led to some divergence in the pattern of the jurisdictions' adoption is the extent to which corporate counsel are permitted to practice in a host

[15] The central language of subsection (c)(4), "arise out of or are reasonably related to the lawyer's practice," has been adopted in almost all the jurisdictions adopting a version of ABA Model Rule 5.5. It provides important coverage that is explained in more detail in Comments [13] and [14].

or adopting jurisdiction permanently, without any need to otherwise meet requirements of licensure imposed on other lawyers (*e.g.*, taking the bar examination, meeting a character and fitness requirement, registering, or paying various fees).[16] A minority of jurisdictions has adopted no such requirements; the majority of jurisdictions have imposed some such requirements; a few jurisdictions (still including Tennessee) treat corporate counsel identically to other lawyers, requiring full licensure for practice as corporate counsel within their borders.[17]

The TBA strongly believes that a middle-ground approach is the preferred one, for several reasons.

- The proposal (proposed Rule 5.5(d)) would not permit out-of-state lawyers serving as in-house lawyers to appear in court to handle litigation and, thus, the frequency and significance of these in-house lawyers' direct interaction with the public will be limited. This limited interaction suggests that public-protection concerns associated with corporate counsel's practice should be lower than they might be for lawyers in other practice settings.

- Any regulatory structure of the type proposed by the TBA presumes informed consent to the limited licensure of corporate counsel, based upon full disclosure of licensure status by corporate counsel to his or her employer. *See, e.g.*, Tenn. Sup. Ct. R. 8, RPC 1.4 (communication with clients).

- The premise of this proposed regulatory structure is licensure, valid and in good standing, in a home jurisdiction, as well as a previous bar admission in that jurisdiction. The TBA approach pays appropriate respect to the bar admission processes of other coordinate United States jurisdictions, while establishing and preserving Tennessee's ability to regulate lawyers practicing on a non-temporary basis within its borders.

- There is real value in identifying lawyers who are, in fact, practicing law in Tennessee, for regulatory purposes.

- The practice of law by lawyers in a corporate setting does place burdens on Tennessee's disciplinary and regulatory structure, perhaps akin to those placed on the system by those non-Tennessee lawyers admitted *pro hac vice* before Tennessee courts. This fact suggests that corporate counsel should participate, with other lawyers

[16] *See supra* fn. 9.

[17] *See Crews v. Buckman Labs. Int'l*, 78 S.W.3d 852 (Tenn. 2002).

practicing in Tennessee, in financially supporting the self-regulation of the profession.

- The approach proposed by the TBA preserves a unitary approach to the profession of law in Tennessee, while imposing a limited additional burden on corporate counsel, financially or otherwise. This approach treats all lawyers practicing permanently in Tennessee as worthy of formally being part of the profession, participating in its burdens, as well as its benefits, and participating in the self-regulation of the profession.

In April 2008, the ABA Section of Legal Education and Admission to the Bar, the entity within which the ABA's function of accrediting law schools is housed, published for comment within the ABA a Model Rule for Registration of In-House Counsel, with the anticipation that it may be considered for adoption as ABA policy by the ABA House of Delegates in August 2008. (A copy of the draft Model Rule is attached as Exhibit G.) While this Court could look to other states with existing rules for guidance on drafting a Tennessee Supreme Court rule for the registration of corporate counsel, the TBA believes that this draft ABA rule provides an appropriate template. In order to accomplish the policy goal proposed by the TBA, some modifications to the draft ABA rule would likely be required, such as confirming that all appropriate obligations to be imposed on registered corporate counsel are identified in Section D. of the rule (*e.g.*, payment of client security fund obligations). Further, in discussions leading up to formal debate on the draft ABA rule, several issues have emerged that bear further scrutiny,[18] and it appears likely that further helpful amendments to the draft rule will be proposed or adopted in the next few months, regardless of whether the ABA adopts the rule in August 2008. Nevertheless, the draft ABA rule, does provide a serviceable template for the drafting of a new Tennessee court rule. Once the ABA's August 2008 consideration of this draft rule is complete,

[18] For example, it has been suggested that the rule should provide for registered corporate counsel to move form one corporate employer to another without undue difficulty.

the TBA will submit to the Court, in this rulemaking proceeding, a draft Tennessee Supreme Court rule, based on the ABA model, but modified for Tennessee, for consideration by the Court.

Amnesty

Despite the relatively longstanding authority in Tennessee that requires all lawyers working as corporate counsel in Tennessee to be fully licensed in Tennessee,[19] the TBA believes that, whether through inadvertence, ignorance, neglect, or otherwise, a number of lawyers are presently practicing in Tennessee as corporate counsel without the benefit of a Tennessee license. Nevertheless, the TBA understands that a number of these lawyers have been, in recent years admitted fully to practice in Tennessee by the Tennessee Board of Law Examiners – and appropriately so.

If the Court were to adopt the TBA's proposal concerning Proposed Rule 5.5, with an accompanying registration requirement for corporate counsel, one of the purposes of such a change in the law would be to lower the perceived and actual burden on corporate counsel wishing to practice law in an in-house setting in Tennessee. With that lowered burden, some point in time must come when any inadvertence, ignorance, or neglect by corporate counsel not now compliant with Tennessee law must cease to be an excuse or explanation for such conduct. In the interest of encouraging all lawyers practicing as corporate counsel in Tennessee to come into full compliance with Tennessee law, the TBA strongly recommends that, as a part of any such MJP reform affecting corporate counsel, a formal, expressly limited, and clearly announced amnesty provision should be enacted, allowing corporate counsel not in compliance to come into compliance without adverse consequences, either for their admission or from a disciplinary point of view, solely arising from prior noncompliance.

[19] *See Crews v. Buckman Labs. Int'l*, 78 S.W.3d 852 (Tenn. 2002).

For purposes of discussion, the TBA suggests that, as part of the adoption of a new Supreme Court rule on registration of corporate counsel, the Court should consider a transition provision providing as follows:

> **Transition Rule.**
>
> A lawyer seeking to practice in this State under the authority of RPC 5.5(d)(1) and who complies fully with the requirements of this Rule on or before *[Insert date six months after adoption of Rule]* shall not be barred from registration under this Rule or from practicing under the authority of RPC 5.5(d)(1) solely by the fact of noncompliance with Tennessee law concerning licensure of corporate counsel, including RPC 5.5 in the form in which it was in force from and after March 1, 2003.

It may also be the case that, in order to fully establish the amnesty policy the TBA supports, the Court would need to enact amendments addressing treatment of applicants for full admission to the Tennessee bar who may not have been in compliance with Tennessee law on corporate counsel licensure.[20]

Proposed Rule 8.5

Critical to MJP reform is the amendment of Rule 8.5 to bring it into accord with ABA Model Rule 8.5, which deals with two subjects – the scope of disciplinary authority of the adopting jurisdiction and choice of law in disciplinary matters. Each is important to any meaningful MJP reform.

These amendments have also met with strong approval in the adopting jurisdictions. In the few years since the adoption of ABA Model Rule 8.5, 36 jurisdictions have adopted a rule identical to or substantially similar to it, 3 jurisdictions' high courts have such a proposed rule

[20] Further, the language stated above does not address any questions related to noncompliance with the law relating to corporate counsel licensure in states *other than* Tennessee by applicants for full admission to the Tennessee bar or by those seeking to register as corporate counsel under the corporate counsel registration rule proposed by the TBA.

pending as a final proposal, and another 5 jurisdictions' MJP study commissions have recommended the adoption of such a rule.[21]

First, as discussed above, as a virtual *quid pro quo* for the extension of permission in proposed Rule 5.5 for non-Tennessee licensed lawyers to practice, under some conditions, in Tennessee, proposed Rule 8.5(a) makes crystal clear that any lawyer availing herself of this permission subjects herself to the disciplinary authority of this Court and its Board of Professional Responsibility. That result is far from clear under present Tennessee Rule 8.5(a).[22]

Second, in an era of increased interstate conduct of lawyers, increased attention must be paid to what rules apply to alleged lawyer misconduct touching more than one jurisdiction. Former ABA Model Rule of Professional Conduct 8.5(b), which also addressed this issue, was not widely adopted among the jurisdictions, and its approach was not considered to be the best by the ABA when revisions were considered a half-dozen years ago. The approach of ABA Proposed Rule 8.5(b) has met with great success among the adopting jurisdictions.[23]

Proposed Amendments to Other Supreme Court Rules

In order to fully implement the proposed amendments to Tennessee Rules 5.5 and 8.5, certain conforming amendments to the other Supreme Court Rules are necessary. As a guiding principle, the proposed amendments attempt to fit the concepts of authorized practice under Rule 5.5(c) and (d) into existing disciplinary procedures. Because Tennessee Supreme Court Rule 33, which governs the Tennessee Lawyer Assistance Program currently would permit assistance for everyone who is a member of the legal profession, there may be no need to amend that rule to make such services available to registered corporate counsel. Because registered corporate

[21] These figures are based on the ABA's analysis of activity in the jurisdictions. *See supra* fn. 1.

[22] *See supra* fn. 11.

[23] According to the ABA's latest analysis, 18 jurisdictions have adopted a rule identical to ABA Model Rule 8.5, and another 18 jurisdictions have adopted a rule similar to it.

counsel could certainly benefit from the availability of those services, the TBA believes it is appropriate to ask them to pay the lawyer assistance fee paid by all Tennessee lawyers.

The TBA submits, as Exhibit E to this Petition, a draft of such amendments to this Court's Rule 9, the Rules of Disciplinary Enforcement, and Supreme Court Rule 25, the rules governing the Tennessee Lawyers' Fund for Client Protection, for the Court's consideration.

"Katrina" Rule

In the months that followed Hurricane Katrina's assault upon the Gulf Coast in the fall of 2005, the difficulties encountered both by lawyers displaced from their homes and offices and by citizens in desperate need of pro bono services that many lawyers – especially including lawyer from other states – were eager to offer, became apparent to bar regulators everywhere.

In an effort to address both these problems, an ABA committee led by Memphis lawyer and TBA ethics committee member Albert C. Harvey, the ABA Task Force on Hurricane Katrina, drafted and gained approval of the ABA House of Delegates for the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. The TBA now strongly urges the Court to consider adopting this rule as a Rule of the Tennessee Supreme Court.

Adoption of the ABA's model rule would accomplish two separate, important purposes: First, the rule would expressly authorize, in the event of a major disaster, lawyers licensed outside Tennessee to render pro bono services in Tennessee on a temporary basis; and second, the rule would expressly authorize a lawyer displaced from the area of a major disaster, and not licensed in Tennessee, to temporarily practice in Tennessee in order to maintain his or her practice and serve his or her clients in the affected jurisdiction.

The ABA's model rule would require that the Court itself make the determination needed to trigger the authority granted by the rule, also enabling the Court, in any such determination to appropriately limit the authority granted and tailor it to the unanticipatable dimensions of the disaster. The proposed rule includes a number of carefully-crafted safeguards, including registration of lawyers practicing under the rule and notification to affected clients.

In the short time since its promulgation, the ABA model rule has been well-received. Following on the ABA's February 2007 adoption of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster, on August 1, 2007, the Conference of Chief Justices adopted a resolution urging the high courts of all the jurisdictions to consider adopting such a rule and "commend[ed] the ABA Model Court Rule on this subject as the foundation upon which to create such a rule."[24] Further, according to the ABA's analysis, 4 jurisdictions (Delaware, Iowa, Missouri, and Washington) have adopted such a rule and another 15 are in the midst of consideration of adoption.[25]

The TBA believes that the adoption of this model rule addressing several MJP issues as they may arise in the event of a disaster would serve the legal profession, the courts, and the public well in preparing for the possibility of a major disaster and its effect upon lawyers, clients, and court, both in Tennessee and elsewhere.

An Important Note about the TBA's Contemporaneous Pro Bono Petition

Contemporaneous with the filing of this petition, the TBA has also filed with this Court a petition concerning various issues related to the rendering of *pro bono publico* services. Included in that set of proposals is a proposed amendment to Tennessee Rule of Professional

[24] Conference of Chief Justices, Resolution No. 3 (adopted Aug. 1, 2007).

[25] *See* State Implementation of ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (updated as of June 19, 2008), *available at* http://www.abanet.org/cpr/jclr/home.html.

Conduct 5.5 that would permit corporate counsel authorized to practice in Tennessee to render *pro bono* services (other than litigation services) through established *pro bono* referral services.

Specifically, the TBA's *pro bono* petition would have this Court adopt a new Tennessee Rule of Professional Conduct 5.5(e), grounded in and extending the Rule 5.5(d) proposed for adoption in this Petition. That proposed language is *not* reflected in the rule draft attached to this Petition. Of course, should this Court decide not to adopt the version of Rule 5.5(d) set out in this Petition, the TBA's proposed Rule 5.5(e) set out in the contemporaneous *pro bono* petition should not be adopted.

CONCLUSION

For these reasons, the TBA petitions this Court to adopt the rule amendments set out above.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served, within 7 days of the filing of this document, upon the individuals and organizations identified in Exhibit H to the petition by regular U.S. Mail, postage prepaid.

ALLAN F. RAMSAUR

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EXHIBIT A

TBA Proposal for Amendment to Tennessee Rule of Professional Conduct 5.5
(redlined to current Tennessee Rule of Professional Conduct 5.5)

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;
MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not~~: (a)~~ practice law in a jurisdiction ~~where doing so violates~~ in violation of the regulation of the legal profession in that jurisdiction~~;~~, or ~~(b)~~ assist ~~a person who is not a member of the bar~~ another in ~~the performance of activity that constitutes the unauthorized practice of law~~ doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

~~[1]~~ [2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. ~~Paragraph (b)~~ This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] ~~Likewise, it does not prohibit lawyers from providing~~ A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a

multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Definitional Cross-References
None.

EXHIBIT B

TBA Proposal for Amendment to Tennessee Rule of Professional Conduct 5.5
(clean version)

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;
MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this

jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise

developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Definitional Cross-References
None.

EXHIBIT C

TBA Proposal for Amendment to Tennessee Rule of Professional Conduct 8.5
(redlined to current Tennessee Rule of Professional Conduct 8.5)

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction ~~where the lawyer is admitted~~ for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a ~~proceeding in~~ matter pending before a ~~court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding)~~ tribunal, the rules ~~to be applied shall be the rules~~ of the jurisdiction in which the ~~court~~ tribunal sits, unless the rules of the ~~court~~ tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur

~~(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and~~

~~(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct~~.

Comment

Disciplinary Authority

[1] ~~Paragraph (a) restates~~ It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. *See*, Rules 6 and 22, ABA *Model Rules for Lawyer Disciplinary Enforcement*. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the

disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. ~~In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.~~ Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, ~~and~~ (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding ~~in~~ pending before a ~~court before which the lawyer is admitted to practice (either generally or pro hac vice)~~ tribunal, the lawyer shall be subject only to the rules of ~~professional conduct of that court~~ the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer ~~licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B~~ shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

~~[5]~~ [6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps

to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

~~[6]~~ [7] The choice of law provision ~~is not intended to apply to~~ applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. ~~Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.~~

Definitional Cross-References
None.

EXHIBIT D

TBA Proposal for Amendment to Tennessee Rule of Professional Conduct 8.5
(clean version)

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. *See*, Rules 6 and 22, ABA *Model Rules for Lawyer Disciplinary Enforcement*. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding ~~in~~ pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Definitional Cross-References
None.

EXHIBIT E

**TBA Proposal for Amendment to Tennessee Supreme Court Rules 9,
(Rules of Disciplinary Enforcement),
21 (Rules for Mandatory Continuing Legal Education), and
25 (Tennessee Lawyers' Fund for Client Protection)**

**Tennessee Supreme Court Rule 9, Section 32.
Multijurisdictional Practice.**

32.1. Any attorney practicing in this State under the authority of RPC 5.5(c) or (d) or otherwise subject to this Court's disciplinary jurisdiction under RPC 8.5 is subject to the disciplinary jurisdiction prescribed in Section 1, subsection 1.1 of this Rule 9 and the procedures for exercise of such jurisdiction prescribed in this Rule 9.

32.2. The authorization for practice granted in RPC 5.5(c) or (d) may be terminated or suspended. The grounds and processes for such termination shall be those provided in this Rule 9 for disbarment; and the grounds and processes for such suspension shall be those provided in this Rule 9 for suspension.

32.3. If an attorney is practicing in this State under authority of RPC 5.5(c), or if an attorney is practicing in this State under authority of RPC 5.5(d) and does not maintain an office in this State, hearing panel proceedings shall occur in the disciplinary district, circuit or chancery court proceedings for review of Board action prescribed in this Rule 9 shall occur in the county or disciplinary district, and unappealed final trial court judgments terminating or suspending the authorization for practice shall be forwarded to the office of the clerk of the Supreme Court for the grand division, where the conduct that forms the basis of the complaint against the attorney occurred.

32.4. The procedures and remedies for reciprocal discipline prescribed in Section 17 of this Rule shall apply to attorneys practicing in this State under authority of RPC 5.5(d)(1). Upon receipt of a certified copy of an order demonstrating that such an attorney has been disciplined in another jurisdiction, the Court shall employ the procedures prescribed in subsections 17.2 through 17.5.

32.5. The information filing, fee payment and other requirements and regulations prescribed in Section 20 of this Rule shall apply to attorneys practicing in this State under authority of RPC 5.5(d)(1). No such attorney shall be deemed to fall under an exemption provided in subsection 20.2.

**Tennessee Supreme Court Rule 25,
Section 20. Multijurisdictional practice.**

20.01. This Rule 25 shall apply to attorneys practicing in Tennessee under authority of RPC 5.5(d)(1) where dishonest conduct, as defined in Section 1, subsection 1.03 of this Rule, meets the criteria set forth in subsections 1.04(a) and (b) thereof.

EXHIBIT F

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 12, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*, dated February 2007.

FURTHER RESOLVED, That the American Bar Association amends Comment [14] to Rule 5.5 of the *Model Rules of Professional Conduct*.

Model Court Rule on Provision of Legal Services Following Determination of Major Disaster
(February 2007)

Rule ___. Provision of Legal Services Following Determination of Major Disaster

(a) Determination of existence of major disaster. Solely for purposes of this Rule, this Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:

(1) this jurisdiction and whether the emergency caused by the major disaster affects the entirety or only a part of this jurisdiction, or

(2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) shall extend only to lawyers who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.

(b) Temporary practice in this jurisdiction following major disaster. Following the determination of an emergency affecting the justice system in this jurisdiction pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are in need of pro bono services and the assistance of lawyers from outside of this jurisdiction is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a pro bono basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the lawyer. Such legal services shall be assigned and supervised through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically designated by this Court.

(c) Temporary practice in this jurisdiction following major disaster in another jurisdiction. Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not

disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

(d) Duration of authority for temporary practice. The authority to practice law in this jurisdiction granted by paragraph (b) of this Rule shall end when this Court determines that the conditions caused by the major disaster in this jurisdiction have ended except that a lawyer then representing clients in this jurisdiction pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation, but the lawyer shall not thereafter accept new clients. The authority to practice law in this jurisdiction granted by paragraph (c) of this Rule shall end [60] days after this Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(e) Court appearances. The authority granted by this Rule does not include appearances in court except:

(1) pursuant to that court's pro hac vice admission rule and, if such authority is granted, any fees for such admission shall be waived; or

(2) if this Court, in any determination made under paragraph (a), grants blanket permission to appear in all or designated courts of this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included, any pro hac vice admission fees shall be waived.

(f) Disciplinary authority and registration requirement. Lawyers providing legal services in this jurisdiction pursuant to paragraphs (b) or (c) are subject to this Court's disciplinary authority and the Rules of Professional Conduct of this jurisdiction as provided in Rule 8.5 of the Rules of Professional Conduct. Lawyers providing legal services in this jurisdiction under paragraphs (b) or (c) shall, within 30 days from the commencement of the provision of legal services, file a registration statement with the Clerk of this Court. The registration statement shall be in a form prescribed by this Court. Any lawyer who provides legal services pursuant to this Rule shall not be considered to be engaged in the unlawful practice of law in this jurisdiction.

(g) Notification to clients. Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in this jurisdiction.

Comment

[1] A major disaster in this or another jurisdiction may cause an emergency affecting the justice system with respect to the provision of legal services for a sustained period of time interfering with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or, though independent of the disaster, whose legal needs temporarily are unmet because of disruption to the practices of local lawyers. Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected

jurisdiction or from their own offices or both, provided the legal services are provided on a pro bono basis through an authorized not-for-profit entity or such other organization(s) specifically designated by this Court. A major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war.

[2] Under paragraph (a)(1), this Court shall determine whether a major disaster causing an emergency affecting the justice system has occurred in this jurisdiction, or in a part of this jurisdiction, for purposes of triggering paragraph (b) of this Rule. This Court may, for example, determine that the entirety of this jurisdiction has suffered a disruption in the provision of legal services or that only certain areas have suffered such an event. The authority granted by paragraph (b) shall extend only to lawyers authorized to practice law and not disbarred, suspended from practice or otherwise restricted from practice in any other manner in any other jurisdiction.

[3] Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency caused by a major disaster; notwithstanding that they are not otherwise authorized to practice law in the affected jurisdiction. Other restrictions on a lawyer's license to practice law that would prohibit that lawyer from providing legal services pursuant to this Rule include, but are not limited to, probation, inactive status, disability inactive status or a non-disciplinary administrative suspension for failure to complete continuing legal education or other requirements. Lawyers on probation may be subject to monitoring and specific limitations on their practices. Lawyers on inactive status, despite being characterized in many jurisdictions as being "in good standing," and lawyers on disability inactive status are not permitted to practice law. Public protection warrants exclusion of these lawyers from the authority to provide legal services as defined in this Rule. Lawyers permitted to provide legal services pursuant to this Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. Alternatively, this court may instead designate other specific organization(s) through which these legal services may be rendered. Under paragraph (b), an emeritus lawyer from another United State jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide pro bono legal services in that jurisdiction pursuant to that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized to provide legal services in this jurisdiction on a temporary basis under Rule 5.5(c) of the Rules of Professional Conduct.

[4] Lawyers authorized to practice law in another jurisdiction, who principally practice in the area of such other jurisdiction determined by this Court to have suffered a major disaster, and whose practices are disrupted by a major disaster there, and who are not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, are authorized under paragraph (c) to provide legal services on a temporary basis in this jurisdiction. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. For purposes of this Rule, the determination of a major disaster in another jurisdiction should first be made by the highest court of appellate jurisdiction in that jurisdiction. For the meaning of "arise out of and reasonably related to," see Rule 5.5 Comment [14], Rules of Professional Conduct.

[5] Emergency conditions created by major disasters end, and when they do, the authority created by paragraphs (b) and (c) also ends with appropriate notice to enable lawyers to plan and to complete pending legal matters. Under paragraph (d), this Court determines when those conditions end only for purposes of this Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of this jurisdiction under paragraph (b) may continue to do so for

such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end [60] days after this Court makes such a determination with regard to an affected jurisdiction.

[6] Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of this jurisdiction. Court appearances are subject to the pro hac vice admission rules of the particular court. This Court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in this jurisdiction under paragraph (b) to appear in all or designated courts of this jurisdiction without need for such pro hac vice admission. If such an authorization is included, any pro hac vice admission fees shall be waived. A lawyer who has appeared in the courts of this jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the Rules of Professional Conduct.

[7] Authorization to practice law as a foreign legal consultant or in-house counsel in a United States jurisdiction offers lawyers a limited scope of permitted practice and may therefore restrict that person's ability to provide legal services under this Rule.

[8] The ABA National Lawyer Regulatory Data Bank is available to help determine whether any lawyer seeking to practice in this jurisdiction pursuant to paragraphs (b) or (c) of this Rule is disbarred, suspended from practice or otherwise subject to a public disciplinary sanction that would restrict the lawyer's ability to practice law in any other jurisdiction.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

…

Comment

. . .

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.

EXHIBIT G

AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association House of Delegates adopts the Model Rule for Registration of In-House Counsel dated August 2008.

Model Rule for Registration of In-House Counsel

GENERAL PROVISIONS:

A. A lawyer not admitted to the practice of law in this jurisdiction but admitted in any other United States jurisdiction who is employed as a lawyer in the jurisdiction of [state name] on a continuing basis, and who is employed exclusively by a corporation, association, or other non-governmental entity, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, shall register as in-house counsel within [xx] days of the commencement of employment as a lawyer or within [xx] days of the effective date of this rule, by submitting to the [registration authority] the following:
    1) A completed application in the form prescribed by the [registration authority];
    2) A fee in the amount determined by the [registration authority];
    3) Documents proving admission to practice law and current good standing in all jurisdictions in which the lawyer is, or has been, admitted to practice law; and
    4) An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer's employment by the entity and that the employment conforms to the requirements of this rule.

SCOPE OF AUTHORITY OF REGISTERED LAWYER:

B. A lawyer registered under this section shall have the rights and privileges otherwise applicable to members of the bar of this state with the following restrictions:
    1) The registered lawyer shall practice exclusively for the employing entity, including subsidiaries or other entities under common control; and
    2) The registered lawyer shall not:
        a. Except as otherwise permitted by the rules of the jurisdiction, appear before a court or tribunal as a lawyer admitted to practice law in this state; or
        b. Offer legal services or advice to any person other than the employing entity or hold himself or herself out as being so authorized.

PRO BONO PRACTICE:

C. Notwithstanding the provisions of paragraph B above, a lawyer registered under this section is authorized to provide pro bono legal services to qualified clients of a legal services program to the extent authorized by the [registration authority].

OBLIGATIONS:

D. A lawyer registered under this section shall:
    1) Pay an annual fee in the amount of $_____;

2) Fulfill the continuing legal education requirements that are required of active members of the bar in the jurisdiction;
3) Report within [___] days to the jurisdiction the following:
    a. Any change in the lawyer's employment;
    b. Any change in the lawyer's license status in another jurisdiction;
    c. Any disciplinary charge, finding, or sanction concerning the lawyer.

LOCAL DISCIPLINE:

E. A registered lawyer under this section shall be subject to the [jurisdiction's Rules of Professional Conduct] and all other laws and rules governing lawyers admitted to the active practice of law in this jurisdiction. The [jurisdiction's disciplinary counsel] has and shall retain jurisdiction over the registered lawyer with respect to the conduct of the lawyer in this or another jurisdiction to the same extent as it has over lawyers generally admitted in this jurisdiction.

AUTOMATIC TERMINATION:

F. A registered lawyer's rights and privileges under this section shall be automatically terminated when:
    1) The lawyer's employment terminates;
    2) The lawyer is suspended or disbarred from practice in any jurisdiction or any federal court or agency before which the lawyer has been admitted; or
    3) The lawyer fails to maintain active status in at least one jurisdiction.

REINSTATEMENT:

G. A registered lawyer whose registration is terminated under paragraph F(1) above, may be reinstated within [xx] months of termination upon submission to the [registration authority] of the following:
    1) An application for reinstatement in a form prescribed by the [registration authority];
    2) A reinstatement fee in the amount prescribed by the jurisdiction;
    3) An affidavit from the current employing entity as prescribed in paragraph A(4).

SANCTIONS:

H. A lawyer under this rule who fails to register shall be:
    1) Subject to professional discipline in this jurisdiction;
    2) Ineligible for admission on motion in this jurisdiction;
    3) Referred by the [registration authority] to the jurisdiction's bar admission authority; and
    4) Referred by the registration authority to the disciplinary authority of the jurisdictions of licensure.

REPORT

The Council of the Section of Legal Education and Admissions to the Bar, at its meeting of December 1-2, 2006, approved the Model Rule for Registration of House Counsel (Rule) for use by jurisdictions adopting or intending to adopt amended Model Rule 5.5(d) of the Model Rules of Professional Conduct. Rule 5.5(d) now excludes from the definition of unauthorized practice of law the provision of legal services by in-house counsel admitted in one jurisdiction and practicing in another jurisdiction, when the lawyer is providing legal services solely to the lawyer's employer. Rule 5.5(d) states:

> A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

Rule 5.5(d) applies to lawyers who are in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The provision assumes that the in-house lawyer can establish an office or other "systematic presence" in the jurisdiction and forgo local licensure without unreasonable risk to the client or others because the employer is able to assess the lawyer's qualifications and the quality of the lawyer's work.

Model Rule 5.5, Comment [17], states that lawyers who establish an office or continuous presence in the state "may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education." In an effort to create a regulatory model useful to states that might wish to follow the registration approach, the Bar Admission Committee drafted, and the Council of the Section has approved for submission to the House, this Rule.

PURPOSE OF REGISTRATION RULE

The Council recognizes that in addition to client security fund assessments and continuing legal education requirements, registration would make an in-house counsel's status known to the public. Local public records would be available to verify that such lawyers are licensed by another state and in good standing. Furthermore, a lawyer who practices pursuant to this rule is subject to the disciplinary authority of the local jurisdiction. (*See* Rules 5.5 and 8.5, ABA *Model Rules of Professional Conduct*.)

The Registration Rule would provide a mechanism for jurisdictions to identify and monitor in-house counsel who are practicing in the jurisdiction. The Rule also provides sanctions for those who fail to register.

TIMING OF REGISTRATION

Paragraph A of the Registration Rule anticipates that the adopting jurisdiction would designate a time period within which the lawyer must register after he or she establishes the office or "continuous presence" in the jurisdiction. The Council recognizes that following the adoption of the Rule those already engaged in an in- house counsel practice would have to come into compliance with the registration system. Each adopting jurisdiction could select the number of days or months within which those lawyers subject to this provision would need to register.

SPECIFIC FILING REQUIRMENTS

The lawyer subject to the registration requirement would pay a fee in an amount determined by the jurisdiction and submit three types of essential documents:

- **An application in a form prescribed by the jurisdiction, requesting information such as name, address, employer's name and address, status of license in another state or states**. No "character and fitness" questions would be asked because a background investigation is not part of the registration process. If there is some reason to doubt the authenticity or accuracy of the documentation, good standing or employment, the prospective registrant would have the burden of resolving all questions to the satisfaction of the registering authority.

- **Proof of admission and proof of current good standing in all jurisdictions where licensed.** An individual who is not in good standing in one or more jurisdictions would be required to disclose this issue whether the status is due to disbarment or because the lawyer is not current with annual registration fees or CLE requirements. Disclosure of the nature and extent of any license restrictions, regardless of how minor, would be required.

- **A sworn statement of an authorized individual from the employing entity attesting that the registering lawyer is employed by the entity and the employment is consistent with the requirements of the rule.** This provision requires a specific attestation that the lawyer is working exclusively for the employer, that the employer is engaged in a lawful enterprise, and that the employment takes place in the state of registration.

SCOPE OF AUTHORITY

Paragraph B describes what the registered lawyer would and would not be permitted to do under the authority of this registration. The registered lawyer could practice law in the state except that the lawyer could not represent anyone other than the employer and the lawyer could not appear before a court or tribunal unless permitted by law or rule.

This provision prohibits registered lawyers from engaging in occasional representation of friends, relatives or employees of the employer and assures that the only permitted client is the employer. The provision also would prohibit the registered lawyer from appearing in court under the auspices of this registration, even if on behalf of the employer. In-house counsel would be prohibited from engaging in a courtroom practice unless they are admitted *pro hac vice* or by some other exception to the local licensure law.

PRO BONO PRACTICE

Paragraph C authorizes and encourages registered lawyers to participate in authorized pro bono programs and to provide legal services to clients of those programs. By limiting pro bono representation to clients of authorized programs, the Rule removes any impediment to full participation by in-house counsel in pro bono legal work while assuring that participation in such programs occurs with adequate oversight.

OBLIGATIONS

The Rule requires payment of an annual fee and completion of whatever continuing legal education requirement the jurisdiction would impose. In addition, the registered lawyer has three obligations:

- To report any change in the lawyer's employment;

- To report any change in the lawyer's licensing status in any other licensing jurisdiction; and
- To report any professional charge, finding or sanction arising in any jurisdiction.

The lawyer must inform the registering authority of any termination of the employment relationship upon which the registrant's status rests. Because the registration status assumes that registered lawyers are in good standing in their state or states of licensure, they bear the burden of reporting any change in that status. By requiring the registered lawyer to report "any change in the lawyer's licensing status," the Rule requires that the lawyer must report any lapse in good standing in a law license for reasons other than professional discipline. Similarly, by stating that the lawyer must report "any professional charge, finding or sanction", the lawyer must report the filing of a complaint, not just the final disposition of a professional discipline complaint.

LOCAL DISCIPLINE

In paragraph E, the Council intends that the Rule give the disciplinary counsel jurisdiction over registered lawyers' professional conduct, whether the conduct arises from the in-house counsel practice or from any other aspect of practice. This authority exists concurrently with that of disciplinary counsel in other states of licensure.

AUTOMATIC TERMINATION

Paragraph F provides that three events can result in *automatic* termination of the registration and thus the lawyer's right to practice as in-house counsel in the state. These are the loss of qualifying employment, whether voluntary or involuntary; suspension or disbarment from any jurisdiction or from any federal court or agency before which the lawyer had been admitted to practice; and the failure to maintain active status in at least one jurisdiction.

REINSTATEMENT

By paragraph G's reinstatement provision, the Council sought to permit the lawyer to move from one in-house counsel position to another without beginning the registration process anew. The "application for renewal" described in paragraph G(1) through (3) could be no more than a short submission identifying the new qualifying employer, assuring the payment of a fee, and providing for an affidavit from the new employer assuring compliance with the registration requirements. The jurisdiction could specify a reasonable period of time, perhaps 3 to 6 months, during which a registered lawyer could transfer the registration from one qualifying employer to another. Failure to transfer the registration within the stated period would result in the termination of the registration status, requiring the lawyer to begin the process anew.

SANCTIONS

The Committee concluded that a provision would be necessary so that a lawyer who is required to register under this provision but fails to do so would be subject to sanctions. The jurisdiction in which in-house counsel practices without registration could sanction such counsel by subjecting him or her to professional discipline. Although Model Rule 5.5 exempts in-house counsel from prosecution for unauthorized practice, the jurisdiction adopting a registration requirement would subject the in-house counsel who fails to comply with the registration rule to prosecution for unauthorized practice. The Rule would prohibit in-house counsel who fail to register from being admitted on motion without examination in the jurisdiction. In-house counsel who fail to register will be referred to the appropriate authorities in the jurisdictions of registration and licensure.

CONCLUSION

By this Rule, the Council proposes a straightforward registration process that neither creates a *de facto* licensing process nor places an undue burden on in-house counsel or on states' bar regulatory systems. The Rule will encourage in-house counsel to come forward and register and that registration will inure to the benefit of the bar as well as to the benefit of the public.

The Council respectfully requests that the House of Delegates approve the Model Rule.

Respectfully submitted,

Ruth McGregor, Chairperson
August 2008

GENERAL INFORMATION FORM

Submitting Entity: Section of Legal Education and Admissions to the Bar

Submitted By: Ruth McGregor, Chairperson

1. Summary of Recommendation(s).

That the House approve the Model Rule for Registration of In-House Counsel.

2. Approval by Submitting Entity.

Approved by the Council of the Section of Legal Education and Admissions to the Bar at its meeting of June 7, 2008.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Rule is meant for consideration and use by jurisdictions intending to adopt amended Rule 5.5(d) of the Model Rules of Professional Conduct. Model Rule 5.5, Comment [17] states that lawyers who establish an office or continuous presence in the state "may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education." In an effort to create a regulatory model useful to states that might wish to follow this approach, the Bar Admission Committee of the Section drafted, and the Council of the Section has approved for submission to the House, this Rule.

5. What urgency exists which requires action at this meeting of the House?

This Model Rule has been under consideration by the Committee for several years and was adopted by the Council in June 2008. The matter is now ready for consideration at the August 2008 meeting of the House.

6. Status of Legislation. (If applicable.)

None.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

The following groups were offered opportunities to comment on the proposed Model Rule: Deans of ABA-approved law schools, presidents of universities with ABA-approved law schools, chief justices of state supreme courts, bar admissions authorities, deans of unapproved law schools, and leaders of organizations interested in the law school approval process (including the Association of American Law Schools, the National Conference of Bar Examiners, the Law School Admissions Council, the National Association for Law Placement, the Conference of Chief Justices, and the National Conference of Bar Presidents). The proposed Model Rule and the memo soliciting comment also were posted on the Section's website, and have been circulated to the Chairs of all ABA entities and other relevant parties.

10. Contact Person. (Prior to the meeting.)

Hulett H. Askew, Consultant on Legal Education 312-988-6744

11. Contact Person. (Who will present the report to the House.)

Jose Garcia Pedrosa, Esq., Section Delegate 305-243-5813

Sidney S. Eagles, Jr., Esq., Section Delegate 919-755-8771

12. Contact person regarding amendments to this recommendation.
(Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

None known at this time.

EXECUTIVE SUMMARY

Summary of the Recommendation

That the House adopt the Model Rule for Registration of In-House Counsel.

Summary of the Issue that the Recommendation Addresses

Model Rule 5.5, Comment [17] states that lawyers who establish an office or continuous presence in the state "may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education." In an effort to create a regulatory model useful to states that might wish to follow this approach, the Bar Admission Committee drafted, and the Council of the Section has approved for submission to the House, this Rule.

Explanation of How the Proposed Policy Addresses the Issues

The Registration Rule would provide a mechanism for jurisdictions to identify and monitor in-house counsel who are practicing in the jurisdiction. In addition to requiring registered lawyers to participate in continuing legal education and support client protection funds, the Rule would also provide for sanctions for those who fail to register.

Summary of Minority Views or Opposition

None.

EXHIBIT H

LIST OF PERSONS TO BE SERVED

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